IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 767 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KANTABEN W/O DAHYABHAI KACHARABHAI THAKOR

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

MR ND GOHIL, Ld.AGP for Respondents.

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 10/05/2001

ORAL JUDGEMENT

1. Heard learned advocate Ms.Subhadra. G. Patel on behalf of the petitioner and Ld. AGP Mr.N. D. Gohil on behalf of the respondent - State.

2. In the present petition under Article 226 of the Constitution of India, the petitioner has challenged the detention order dated 8th November, 2000 passed by the Police Commissioner, at Ahmedabad under Sub Section (1) of Section 3 of the Prevention of Anti Social Activities Act ('PASA Act' for short.) The present petitioner has been detained in Vadodara Jail as Class-II detenu. The grounds of detention have been communicated and supplied to the present petitioner on 8th November, 2000, wherein in, all six offences have been registered against the

present petitioner in respect to the prohibition case and the last offence has been registered against the present petitioner on 24th October, 2000. The present petitioner was released on bail in respect of all the offences registered against the present petitioner. The statements of witnesses whose identity has not been disclosed which has been recorded by the Police Inspector, Madhavpura Police Station on 1st November, 2000 and the said statement has been verified by detaining authority on 7th November, 2000 and the second statement of the witness has been recorded by the same Inspector on 2nd November, 2000 and the same was verified by the detaining authority on 7th November, 2000 and, thereafter, immediately on the next day i.e., on 8th November, 2000 the detention order was passed by the detaining authority against the present petitioner. The affidavit-in-reply has been filed by the respondent State which has been taken on record.

3. Learned advocate Ms.Subhadra G. Patel for the petitioner has raised various contentions before this Court challenging the detention order passed by the detaining authority. According to her submissioin, one contention is enough to vitiate the order of detention that the two statements of the witnesses which have been verified by the detaining authority on 7th November, 2000 and on the very next day i.e. on 8th November, 2000, the detention order has been passed and, therefore, according to the view taken by this Court in the case of Ranubhai Bhikhabhai Bharwad (Vekaria) v. State of Gujarat and others, reported in 2000 (3) GLR 2696, the order of detention is required to be set aside on the ground that the detaining authority has exercised power in a mechanical manner which is devoid of application of mind.

4. Learned AGP Mr.N.D.Gohil for the respondent State has submitted that the respondent detaining authority has filed detailed reply and explained all circumstances and also considering the fact that the activity which has been carried out by the petitioner in disturbing the public order and peace which amounts to Anti Social Activities is required to be restrained by way of detention order, otherwise it will be adversely effecting the public order and peace. Mr.Gohil has also submitted that the detaining authority has applied his mind and considering the genuineness of the statements, privilege under section 9(2) of PASA Act has been claimed and there is no illegality in the detention order passed by the detaining authority.

5. I have heard learned advocates appearing on

behalf of respective parties. In respect to the first contention which has been raised by the learned advocate on behalf of the petitioner that at the time of passing the detention order, the petitioner was in judicial custody and at that time it is the duty of the detaining authority to consider the same and there is no cogent material on record which justified the detention order as per the view taken by the Apex Court in the case of Ramesh Yadav v/s. District Magistrate, Etah and other, reported in 1985 SCC (Criminal) 514. The Apex Court has observed that merely on the ground that an accused in detention as an under-trial prisoner was likely to get bail, an order of detention under the National Security Act should not ordinarily be passed. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Recently, the Apex Court has considered the very identical situation in the case of Amritlal and others v/s. Union Government, Through Secretary, Ministry of Finance and others, reported in (2001) 1 S.C.C. 341. The Apex Court has observed that the order is required to be passed by the detaining authority after having subjective satisfaction. When the detenu is already in jail then the detaining authority must be satisfied on the basis of available cogent material about the likelihood of his moving application for bail. In absence of such satisfaction the detention order cannot be sustained.

6. In light of the aforesaid observations made by the Apex Court, while considering ground of detention before the detaining authority, there was no cogent material before the detaining authority which has been discussed to the effect that there is likelihood of the petitioner to be released on bail. No circumstances have been pointed out by the detaining authority which justified the subjective satisfaction of detaining the petitioner. Therefore, on this ground, the detention order is required to be quashed and set aside.

7. In respect to the second contention that when the detaining authority has verified the statements and immediately on the next day, if the detention order has been passed, then the view taken by this Court in the case of Ranubhai Bhikhabhai Bharwad (Vekaria) v/s. State of Gujarat and others, reported in 2000 (3) GLR 2696, that such exercise by the detaining authority has been considered as a mechanical one devoid of application of mind and results thereto, the order of detention has been quashed and set aside. Therefore, the following

observations are important to be considered which are as under.

"After referring to Kalidas C. Kahar v. State of Gujarat, 1993 (2) GLR 1659 the Court observed:

The statements of the three witnesses in the instant case which were recorded before the Police Inspector on 17th August, 1999, 21st August 1999 and 25th August, 1999 with regard to the incidents dated 10th July, 1999, 13th June, 1999 and 26th June, 1999 were the material along with the proposal which is said to be have been made on 27th August, 1999 and it is clear from the record that it was on 29th August, 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August, 1999 at any time prior to 29th August, 1999 and on 29th August, 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafer on the following day, i.e. on 30th August, 1999 the detention order has been passed.

The manner in which the verification has been recorded of the statements made by these three witnesses for the purpose of Sec.9(2) shows that the same has been done only as an empty formality inasmuch as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever the statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Sec.9(2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power under Sec.9(2) and it is established that in such cases, the wrong exercise of power under Sec.9(2) adversely affects the detenu's right of making an effective

representation guaranteed under Art.22(5) of the Constitution of India.

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority, it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege under Sec.9(2) of the Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the present case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August, 1999 i.e., on the next day to the date on which the materials were considered by the detaining authority.

8. In light of the aforesaid observation of the Apex Court as well as this Court, according to my opinion, the detention order is required to be set aside as the detention order has been passed by the detaining authority without application of mind and it amounts to exercise of the power in mechanical manner and, therefore, the same is required to be quashed.

9. For the reasons recorded in the oral judgment, the present petition succeeds and the same is allowed. The order of detention dated 8th November, 2000 is vitiated and resulted to quash and set aside. The detenu Kantaben w/o. Dahyabhai Kacharabhai Thakor who has been detained at present in Vadodara Jail be set at liberty forthwith if she is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct service is permitted.

(H. K. Rathod, J.)

(vrpanchal)*